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In the United States  
Circuit Court of Appeals  
For the Ninth Circuit. 4

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HERBERT P. SEARS, Trustee of the Estate of Globe  
Drug Company, Inc., Bankrupt,  
Complainant,

vs.

LEW O. STELZNER and T. E. KLIPSTEIN,  
Defendants.

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T. E. KLIPSTEIN,  
Appellant,

vs.

HERBERT P. SEARS, Trustee in Bankruptcy of the  
Estate of Globe Drug Company, Inc.,  
Appellee.

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Transcript of Record

Upon Appeal from the District Court of the United States for the  
Southern District of California, Northern Division.

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FILED

SEP 8 0 1938

PAUL P. O'BRIEN



In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HERBERT P. SEARS, Trustee of the Estate of Globe  
Drug Company, Inc., Bankrupt,  
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## TYPICAL INDEX.

*Wiley's Case:* When stated likely to be of an important nature, errors on certified copies appearing in the original record are pointed out by the clerk, and, likewise, certified copies appearing in the original record are pointed out and corrected herein accordingly. When possible, an omission from the text is indicated by pointing to the page and line number which the omitted part is upon.

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Names and Addresses of Attorneys.

For Appellant:

HOMER JOHNSTONE, Esq.,

SIDNEY H. WYSE, Esq.,

801 Bartlett Building,

Los Angeles, California.

For Appellee:

ARTHUR L. SHANNON, Esq.,

CLARENCE A. SHUEY, Esq.,

1240 Merchants Exchange Building,

San Francisco, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

—oo0oo—

HERBERT P. SEARS, Trustee of :  
the Estate of Globe Drug Company, :  
Inc., Bankrupt, :

Complainant, :

vs. :

LEW O. STELZNER and T. E. :  
KILPSTEIN, :

Defendants. :

. . . . . :

THE PRESIDENT OF THE UNITED STATES:

To HERBERT P. SEARS, Trustee in Bankruptcy of the Estate of Globe Drug Company, Inc., Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, thirty days from and after the date of this citation, pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the Southern District of California, from a decree in said cause, filed and entered on the 29th day of December, 1937, as modified and amended by an order of said Court made and entered the 2nd day of April,

No. E-4

In Equity

CITATION



1938, wherein T. E. Klipstein is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, THE HONORABLE LEON R. YANKWICH, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, this 25th day of April, 1938.

Leon R. Yankwich

Judge of the United States District Court for the  
Southern District of California

Due, personal service of the within citation, by copy, is hereby admitted this 29th day of April, 1938.

A. L. Shannon

C. A. Shuey

Attorneys for Appellee

Due, personal service of the appellant T. E. Klipstein's assignment of errors heretofore filed in the above action, by copy, is hereby admitted this 29th day of April, 1938.

A. L. Shannon

C. A. Shuey

Attorneys for Appellee

[Endorsed]: Filed May 3, 1938. R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

STIPULATION FOR FILING OF AMENDED  
BILL OF COMPLAINT

IT IS HEREBY STIPULATED by and between the above named complainant and the above named defendant, T. E. Klipstein, that the foregoing Amended Bill of Complaint attached hereto may be filed herein as of course; and it is further stipulated that the Answer to the original Bill of Complaint heretofore filed herein by said defendant, T. E. Klipstein, be considered in all respects as his Answer to said Amended Bill of Complaint; it being expressly understood by and between the parties to this stipulation that the said defendant, T. E. Klipstein, reserves the right to assert each and every defense available to him under his Answer as originally filed, and any and all objections to the legal sufficiency of said Bill of Complaint, and is not to be deemed to have waived any such matter of defense hereby.

Dated: December 18, 1936.

Clarence A. Shuey

Arthur L. Shannon

Attorneys for Complainant

HOMER JOHNSTONE and

SIDNEY H. WYSE

By Homer Johnstone

Attorneys for Defendant T. E. Klipstein

[Endorsed]: Filed Dec. 24, 1936. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

—oo0oo—

HERBERT P. SEARS, Trustee of )	
the Estate of Globe Drug Company, )	
Inc., Bankrupt, )	No. E 4
)	
Complainant, )	IN EQUITY
)	
vs. )	AMENDED
)	BILL OF
LEW O. STELZNER and T. E. )	COMPLAINT
KLIPSTEIN, )	
)	
Defendants. )	

—oo0oo—

TO THE HONORABLE DISTRICT COURT OF  
THE UNITED STATES, IN AND FOR THE  
NORTHERN DIVISION OF THE SOUTHERN  
DISTRICT OF CALIFORNIA:

Now comes the above named complainant and files here-  
in his amended bill of complaint of course as follows, to  
wit:

I.

In or about the month of April, 1936, Globe Drug Com-  
pany, Inc., was adjudicated a bankrupt by an order duly  
made and entered by the above entitled court, and there-  
after, on April 18, 1936, by proceedings duly had in the  
administration of said bankrupt's estate, plaintiff was  
appointed as trustee of said estate, thereupon duly quali-

fied as such, and ever since has been and now is the duly appointed, qualified, and acting trustee of the estate of said bankrupt.

## II.

At all times herein mentioned said Globe Drug Company, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of California; at all of such times Lew O. Stelzner was a stockholder, the president, and one of the members of the board of directors of said corporation, and T. E. Klipstein was a stockholder, the vice-president, and one of the members of the board of directors of said corporation.

## III.

In about the year 1928 the defendants Lew O. Stelzner and T. E. Klipstein borrowed the sum of \$17,000.00 from the Bank of America, and in consideration of such loan executed to such bank their personal joint and several promissory note for the same; said sum of \$17,000.00 was thereupon used by said defendants for the purpose of purchasing certain issued and outstanding shares of the Globe Drug Company, Inc., for their own personal and individual account.

## IV.

During the period of time from the execution of said note up to October 19, 1935, various payments were made on account of the principal and interest of said note, aggregating a sum in excess of \$12,200.00; all such payments were made by, and directly from and with the funds of, said corporation; at all of the times when said payments were made as aforesaid, said corporation owed various sums of money to various creditors, and was in

an insolvent condition; no consideration whatever was ever received by said corporation for or in connection with said payments; said payments were made as aforesaid with the purpose and intent on the part of said corporation, and of said defendants, of hindering, delaying, and defrauding said creditors; complainant does not know the true aggregate amount of the sums so paid out as aforesaid, and it is therefore necessary that defendants render to this court a true and accurate account thereof.

#### V.

On or about October 19, 1935, there remained unpaid on said promissory note a balance of \$4,800.00; on or about said date defendants, acting as directors and officers of said corporation, caused to be executed to said Bank of America the promissory note of said corporation in the sum of \$4,800.00; said note was thereupon accepted by said bank in payment of the balance due on said promissory note of the defendants; said corporation received no consideration for the execution of the said note, either directly or indirectly.

#### VI.

Shortly after the execution of said last mentioned promissory note, the defendant Klipstein purchased the same from said bank and thereupon, and on October 19, 1935, commenced an action in the Superior Court of the State of California, in and for the County of Kern, to recover from said corporation the amount alleged by him to have been so paid in the purchase of said note; thereafter the defendants fraudulently permitted said corporation to suffer a default judgment to be entered in said action against it for the sum of \$5,364.00; thereafter execution was issued on said judgment, pursuant to which

all of the properties and assets of said corporation were sold at public auction by the sheriff of said county. On information and belief, plaintiff alleges that the value of said property so sold upon execution was the sum of \$5,000.00.

#### VII.

At the time said action was commenced and said execution sale was effected as aforesaid, said corporation owed various sums of money to various creditors, and was insolvent; said defendants, acting in concert and conspiracy with one another, caused said action to be commenced and said execution sale to be effected, with the purpose and intent of hindering, delaying, and defrauding the creditors of said corporation.

#### VIII.

The above mentioned creditors of said corporation have duly proved their claims in said bankruptcy proceedings; there are not sufficient assets in the bankrupt's estate with which to pay such claims in full, and unless said payments made by said corporation, and said property, or its value, are restored to the bankrupt's estate, the claims of said creditors will remain unsatisfied.

For a separate, further, and second cause of action, complainant alleges that:

#### I.

All of the allegations and statements set forth in paragraphs I, II and III of the foregoing first cause of action are hereby incorporated in this second cause of action as if fully set forth herein.

## II.

Within three years immediately prior to plaintiff's appointment and qualification as such trustee as aforesaid, various payments were made on account of the principal and interest of said note, aggregating the sum of \$5,-132.71; all of such payments were made with funds withdrawn from the assets of said corporation at the willful instigation, authorization, and direction of said defendants, acting as officers and directors of said corporation, and while they were stockholders thereof; at said times said corporation had no surplus or net profits of any kind out of which to pay dividends on its shares, nor was said corporation then in the process of winding up or dissolution; nor were said withdrawals made upon the vote or written consent of the holders of any of the shares of said corporation other than the shares then held by the defendants, nor did the Commissioner of Corporations of the State of California ever issue any permit authorizing such withdrawals; therefore, the withdrawals of the funds and assets of said corporation as aforesaid were in violation of Section 363 of the Civil Code of the State of California, and of Section 309 of said code as it existed prior to the adoption of said Section 363; at all of the times when said funds and assets were withdrawn as aforesaid, said corporation owed to various creditors sums of money which, as plaintiff is informed and believes, aggregated in excess of the aggregate of the sums so withdrawn as aforesaid.

## III.

The above mentioned creditors of said corporation have duly proved their claims in said bankruptcy proceedings; there are not sufficient assets in the bankrupt's estate with which to pay such claims in full, and unless said payments and withdrawals are restored to the bankrupt's estate, the claims of said creditors will remain unsatisfied.

IN CONSIDERATION WHEREOF, and inasmuch as complainant is remediless, according to the strict rule of common law, and can only have relief in a court of equity where matters of this nature are cognizable, said complainant prays that said defendants, and each of them, be required, according to his best and utmost knowledge, remembrance, information, and belief, to make a full, true, and correct answer to this amended bill of complaint, but not under oath, or affirmation, the benefit of which is hereby expressly waived; that this court direct said defendants to render herein a true and accurate account of the sums of money paid out and withdrawn as hereinbefore alleged; and that this court render a decree against said defendants, and each of them, for such sums of money and the value of such property as is found to have been paid out by, and taken or withdrawn from, the bankrupt corporation as aforesaid, and for such other and further relief as to the court may seem meet and proper.

Clarence A. Shuey

Arthur L. Shannon

Attorneys for Complainant

[Endorsed]: Filed Dec. 24, 1936. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.



[TITLE OF DISTRICT COURT AND CAUSE.]

## ANSWER

Comes now T. E. Klipstein, one of the defendants in the above-entitled action, and in answer to plaintiff's bill of complaint on file herein, and in his own behalf and not for any other defendant, admits, denies and alleges as follows:

### I.

Admits the allegations of paragraph I of plaintiff's bill of complaint.

### II.

Denies each and every allegation of paragraph II of plaintiff's bill of complaint, except that defendant admits that, at all times therein mentioned, the Globe Drug Company, Inc., was a corporation duly organized and existing under and by virtue of the Laws of the State of California.

### III.

Denies each and every allegation of paragraph III of plaintiff's bill of complaint, except that defendant admits that on or about the 3rd day of January, 1928, Lew O. Stelzner borrowed the sum of \$17,000.00 from the Bank of America, or its predecessor bank at Bakersfield, California; that in consideration for said loan said Lew O. Stelzner executed his promissory note to said bank; that defendant affixed his signature on and to the said note; but in this connection defendant alleges that he received no consideration of any description at the time of the signing of said note or at any time thereafter, and that no consideration whatever passed to this defendant for his said signature.

## IV.

Denies each and every allegation of paragraph IV of plaintiff's bill of complaint, except that defendant admits that certain payments were made on the said note; the amount and extent and dates of such payments being unknown to this defendant.

## V.

Denies each and every allegation of paragraph V of plaintiff's bill of complaint, except that defendant admits that on or about the 19th day of October, 1935, there was a balance unpaid on the said promissory note, the exact amount thereof being unknown to defendant; and defendant further admits that the Bank of America received a note from said corporation on or about said date.

## VI.

Denies each and every allegation of paragraph VI of plaintiff's bill of complaint, except that defendant admits that on or about the 19th day of October, 1935, an action was filed by him in the Superior Court of the State of California, in and for the County of Kern, against the said corporation.

## VII.

Denies each and every allegation of paragraph VII of plaintiff's bill of complaint.

## VIII.

Alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph VIII of plaintiff's bill of complaint, and

placing his denial on that ground denies each and every allegation of said paragraph.

#### IX.

Answering paragraph I of plaintiff's second cause of action, defendant hereby refers to and incorporates herein as if fully set out hereinafter, all of paragraphs I, II and III of this answer.

#### X.

Denies each and every allegation of paragraph II of plaintiff's second cause of action contained in plaintiff's said bill of complaint.

#### XI.

Alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph III of plaintiff's second cause of action, and placing his denial on that ground denies each and every allegation of said paragraph.

AS A FURTHER SEPARATE AND DISTINCT DEFENSE TO PLAINTIFF'S BILL OF COMPLAINT, Defendant alleges:

#### I.

That the plaintiff is estopped from, and should not be permitted to say that this defendant is liable for any withdrawals from the funds of said Globe Drug Company, Inc., for the reason that any and all transaction or transactions by and between this defendant and the said alleged bankrupt were initiated and maintained at the solicitation

of the said bankrupt and for the purpose of enabling it to carry on its business affairs, and in order to procure funds with which to protect and save its creditors from imminent loss and losses with which they were confronted at the time of the aforementioned transactions, and that the said creditors received all the benefits thereof; that this defendant received no consideration or benefit or benefits whatsoever from any of such transactions, but in fact sustained personally heavy monetary losses by reason thereof.

AS A FURTHER SEPARATE AND DISTINCT DEFENSE TO PLAINTIFF'S BILL OF COMPLAINT, Defendant alleges:

I.

That as to any withdrawals of funds from the Globe Drug Company, Inc., alleged to have been made more than three years prior to the commencement of this action plaintiff's cause of action is barred by the California Code of Civil Procedure, Section 338, subdivisions (1) and (4) thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his bill of complaint, and that defendant recover his costs of suit incurred herein.

Homer Johnstone

Attorney for Defendant T. E. Klipstein.

936 A. G. Bartlett Bldg.  
Los Angeles, California.

STATE OF CALIFORNIA )  
 ) ss.  
 COUNTY OF KERN )

T. E. KLIPSTEIN, being first duly sworn deposes and says: That he is one of the defendants in the foregoing and above entitled action; that he has read the within Answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are herein stated on his information or belief, and as to those matters he believes it to be true.

T. E. Klipstein

Subscribed and Sworn to before me this 6th day of December, 1936

[Seal]

Cara Pfuhl

Notary Public in and for said County and State

[Endorsed]: Filed Dec. 7, 1936. R. S. Zimmerman,  
 Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

ANSWER OF DEFENDANT LEW O. STELZNER

Comes now LEW O. STELZNER, one of the defendants in the above entitled action, and in answer to the bill of complaint on file herein, and in his own behalf and not for any other defendant, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations of Paragraph I of the said bill of complaint.

II.

Denies generally and specifically, each and every allegation contained in Paragraph II of said bill of complaint, except that defendant admits that at all times therein mentioned the Globe Drug Company, Inc., was a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

Denies generally and specifically, each and every allegation contained in Paragraph III of said bill of complaint, except that defendant admits that on or about the 3rd day of January, 1928, defendant borrowed from the Bank of America the sum of \$16,000.00 and executed his promissory note to said bank for said sum; that T. E. Klipstein endorsed said note for the accommodation of defendant; that defendant used the proceeds of the said loan for the purchase of stock of the Globe Drug Company, Inc., and caused the said stock to be issued to the said T. E. Klipstein as security for said endorsement.

## IV.

Denies generally and specifically, each and every allegation contained in Paragraph IV of said bill of complaint, except that defendant admits that during the period from the execution of said note up to October 19th, 1935, or thereabouts, various payments were made on account of said note, and that all of such payments were made with the funds of the said corporation, but defendant alleges that all of said payments were made out of the surplus profits of said corporation.

## V.

Denies generally and specifically, each and every allegation contained in Paragraph V of said bill of complaint, except that defendant admits that on or about the 19th day of October, 1935, there remained unpaid on said promissory note a balance of \$4800.00, and that on or about the said date the said corporation executed to the Bank of America its promissory note in the sum of \$4800.00.

## VI.

Denies generally and specifically, each and every allegation contained in Paragraph VI of said bill of complaint, except that defendant admits that on or about the 19th day of October, 1935, the defendant Klipstein purchased the said note from the Bank of America and commenced an action in the Superior Court of the State of California, in and for the County of Kern, against said corporation upon the said note executed by said corporation; that judgment in said action was rendered in favor of this answering defendant in the sum of \$5364.00, or thereabouts, and execution thereon issued; that pursuant to said execution a certain stock of goods belonging to the said corporation was sold by the sheriff at public auction,

and that the reasonable value of the said stock of goods was the sum of \$1900.00.

#### VII.

Denies generally and specifically, each and every allegation contained in Paragraph VII of said bill of complaint.

#### VIII.

This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph VIII of the said bill of complaint, and placing his denial upon that ground, denies generally and specifically, each and every allegation of said paragraph.

#### IX.

Answering paragraph I of complainant's second cause of action, defendant hereby refers to and incorporates herein as if fully set out hereinafter all of paragraphs I, II and III of this answer.

#### X.

Denies generally and specifically, each and every allegation contained in Paragraph II of the second cause of action contained in said bill of complaint.

#### XI.

This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph III of the second cause of action contained in said bill of complaint, and placing his denial upon that ground, denies generally and specifically, each and every allegation of said paragraph.

As a FURTHER AND SEPARATE DEFENSE to said bill of complaint, defendant alleges that the causes of action alleged therein are, and each of them is, barred by the provisions of Subdivisions 1 and 4 of Section 338 of the Code of Civil Procedure of the State of California.



As a FURTHER AND SEPARATE DEFENSE to said bill of complaint, defendant alleges that the above entitled court has no jurisdiction of the subject matter of this action.

WHEREFORE, defendant prays that complainant take nothing by his bill of complaint, and that defendant recover his costs of suit incurred herein.

David E. Peckinpah

Attorney for Defendant, LEW O. STELZNER.

STATE OF CALIFORNIA )

) ss.

COUNTY OF FRESNO. )

DAVID E. PECKINPAH, being first duly sworn, deposes and says: That he is the attorney for the defendant, LEW O. STELZNER, in the above entitled action; that said defendant is absent from the County of Fresno where his attorney has his office and for that reason affiant makes this verification; that affiant has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters as are therein stated on his information and belief, and as to those matters that he believes it to be true.

David E. Peckinpah

Subscribed and sworn to before me, this 9th day of June, 1937.

[Seal]

June Johnson

NOTARY PUBLIC in and for the County of Fresno, State of California.

[Endorsed]: Filed Jun. 11, 1937. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

STIPULATION TO SET FOR TRIAL

IT IS HEREBY STIPULATED by and between the respective parties hereto that the above entitled action may be set down for trial on any date convenient to the court during the term commencing on the first Monday in October, 1937.

IT IS FURTHER STIPULATED that a jury for the trial of such action is hereby waived.

Dated: July 7, 1937.

Clarence A. Shuey  
Arthur L. Shannon  
Attorneys for Complainant

David E. Peckinpah  
Attorney for Defendant  
Lew O. Stelzner

Homer Johnstone  
Attorney for Defendant  
T. E. Klipstein

[Endorsed]: Filed Aug. 4, 1937. R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

AMENDMENT TO THE ANSWER OF THE  
DEFENDANT T. E. KLIPSTEIN

Comes now the defendant T. E. Kilpstein, and by leave of Court pursuant to the written stipulation of the plaintiff on file herein, files this amendment to the answer of said defendant to complainants Bill of Complaint, (which by the terms of said stipulation was extended to and deemed to be the answer of said defendant to Complainants Amended Complaint), and by way of such amended answer admits, denies and alleges as follows:

*1.*

Denies each and every allegation of paragraph *11* of plaintiffs amended Bill of Complaint, except that defendant admits that Articles of Incorporation were filed with the Secretary of State of the State of California on the 17th day of July, 1920.

Defendant further alleges that no other or further steps of any kind were ever taken to complete the organization of said Corporation; that no stock was ever issued by said corporation; that no bylaws were ever adopted by said corporation; and, that the persons who executed the said articles and caused the same to be filed as aforesaid thereupon became the Directors of said Corporation and still are such directors thereof.

Except as to foregoing amendment to paragraph 11 of this defendants answer as originally filed herein defendant hereby adopts and re-states herein to the same extent as if fully set out hereinafter each and all of the respective recitals, allegations and paragraphs of said answer to be deemed to be and considered as the answer of this defendant to Complainants amended Bill of Complaint herein.

WHEREFORE, defendant prays that complainant take nothing by his Bill of Complaint herein, and that defendant recover his costs of suit incurred herein.

Homer Johnstone

S. H. Wyse

Attorneys for defendant T. E. Klipstein

801 Bartlett Bldg

Los Angeles, Calif

[Endorsed]: Filed October 27, 1937. R. S. Zimmerman, Clerk By Louis J. Somers, deputy.

[TITLE OF DISTRICT COURT AND CAUSE.]

TRIAL BRIEF OF DEFENDANT KLIPSTEIN  
SUMMARY OF POINTS DISCUSSED

I. There was a complete failure of proof necessary to entitle complainant to a recovery against defendant Klipstein.

\* \* \* \* \*

C. There was no proof that defendant Klipstein received anything by reason of any transaction in question, and in fact the proof showed affirmatively that he was the loser by such transactions of more than \$5,000.00.

D. There was no proof that defendant Klipstein was a de jure director of the bankrupt, and there was insufficient proof to hold him as a de facto director.

\* \* \* \* \*

IV. Complainant is estopped from asserting that defendant Klipstein is liable on the causes of action stated.

\* \* \* \* \*

Defendant Klipstein therefore asks this Court to declare by its judgment that neither in equity or law has the complainant the right to recover any part of the moneys by him claimed.

Respectfully submitted,

Homer Johnstone  
Sidney H. Wyse.

Attorneys for defendant Klipstein.

[Endorsed]: Filed Nov. 13, 1937. R. S. Zimmerman,  
Clerk By Louis J. Somers, Deputy Clerk.

At a stated term, to-wit: The April Term, A. D. 1937, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno on Saturday the 4th day of December in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable: Leon R. Yankwich District Judge.

HERBERT P. SEARS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. E-4
	)	
LEW O. STELZNER, et al	)	
	)	
Defendants.	)	

This cause having been heard upon the issues raised by the Bill of Complaint and the Answer, and evidence oral and documentary having been introduced, and the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments and briefs of counsel, now finds in favor of the plaintiff and (upon the authority of *In re Wright Motor Company* (C. C. A. 9, 1924) 299 Fed 106) orders a decree entered ordering and decreeing that plaintiff do have and recover from the defendants Lew O. Stelzner and T. E. Klipstein and each of them, the

sum of \$4255.54 and accrued interest, the same being the sums shown to have been illegally withdrawn and paid out by the defendants and for which they are liable to account to the plaintiff.

The Court finds that there is undisputed proof in the record as to the amounts withdrawn and that therefore an accounting is not necessary.

Decree is to provide that the recovery of the full amount named and accrued interest shall be contingent upon the needs for funds to satisfy the claims against the estate and recovery shall be had in full only if the above amount when added to the cash now in the hands of the trustee is needed to satisfy all the debts of the estate. Otherwise recovery to be reduced proportionately and surplus be returned to the defendants.

Findings and decree to be prepared by plaintiff under Rule 44.

Exception to the defendants.

[TITLE OF DISTRICT COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause came on regularly for trial before the above entitled Court, sitting without a jury, plaintiff appearing by his counsel, Arthur L. Shannon and Clarence A. Shuey, defendant Lew O. Stelzner appearing by his counsel, David E. Peckinpah and L. N. Barber, and defendant T. E. Klipstein appearing by his counsel, Homer Johnstone and S. H. Wyse; and evidence both oral and documentary having been introduced and received, and the Court having considered the evidence and the law and the arguments and briefs of respective counsel, the Court now makes its Findings of Fact and Conclusions of Law as follows, to wit:

FINDINGS OF FACT

I.

That on March 6, 1936, Globe Drug Company, Inc. was adjudicated a bankrupt by an order duly made and entered by the above entitled Court, and thereafter, on April 18, 1936, by proceedings duly had in the administration of said bankrupt's estate, plaintiff was appointed as trustee of said estate, thereupon duly qualified as such, and ever since has been and now is the duly appointed, qualified, and acting trustee of the estate of said bankrupt.

II.

That at all times herein mentioned said Globe Drug Company, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of California; that ever since January 3, 1928, the defendant Lew O. Stelzner was a stockholder, the president, and



one of the members of the Board of Directors of said corporation, and the defendant T. E. Klipstein was a stockholder, the secretary, and one of the members of the Board of Directors of said corporation.

### III.

That on January 3, 1928, the defendants Lew O. Stelzner and T. E. Klipstein borrowed the sum of \$17,000.00 from the Bank of America, and in consideration of such loan executed to such bank their personal joint and several promissory note for the same; that said sum of \$17,000.00 was thereupon used by said defendants for the purpose of purchasing certain issued and outstanding shares of said Globe Drug Company, Inc., for their own personal and individual accounts.

### IV.

That during the period of time from the execution of said note up to October 19, 1935, various payments were made on account of the principal and interest of said note, aggregating a sum in excess of \$12,200.00; that all of such payments were made by, and directly from and with the funds of, said corporation; that at each and all of the times when said payments were made as aforesaid, said corporation owed various sums of money to various creditors, such indebtedness at such times being in excess of the amounts of such respective payments; that no consideration whatever was ever received by said corporation for or in connection with any of said payments; that for a period of at least three years prior to the date of its adjudication in bankruptcy, said corporation was in an insolvent condition; that the payments made by said corporation on the personal note of said defendants during said three-year period aggregated a sum of at least

\$4,255.54; that each and all of said payments were made as aforesaid with the purpose and intent on the part of said corporation, and of said defendants, of hindering, delaying, and defrauding the creditors of said corporation.

#### V.

That on or about October 19, 1935, there remained unpaid on the principal of said promissory note a balance of \$4,800.00; that on or about said date defendants, acting as directors and officers of said corporation, caused to be executed to said Bank of America the promissory note of said corporation in said sum of \$4,800.00; that said note was thereupon accepted by said bank in payment of the balance due on said promissory note of the defendants; that said corporation received no consideration for the execution of said note, either directly or indirectly.

#### VI.

That shortly after the execution of said last mentioned promissory note, the defendant Klipstein purchased the same from said bank and thereupon, and on October 19, 1935, commenced an action in the Superior Court of the State of California, in and for the County of Kern, to recover from said corporation the amount alleged by him to have been so paid in the purchase of said note; that illegally and without right or cause [L.R.Y.. J.] thereafter the defendants, fraudulently permitted said corporation to suffer a default judgment to be entered in said action against it for the sum of \$5,364.00; that thereafter execution was issued on said judgment, pursuant to which all of the properties and assets of said corporation were sold at public auction by the sheriff of said county.

## VII.

That at the time said action was commenced and said execution sale was effected as aforesaid, said corporation owed various sums of money to various creditors and was insolvent, and said action was commenced and prosecuted, such judgment was suffered to be taken, and said execution sale effected with the purpose and intent on the part of said corporation and the defendants of hindering, delaying, and defrauding the creditors of said corporation.

## VIII.

That the payments made out of said corporation's funds as aforesaid, were authorized and consented to by the defendants while acting as officers and directors of said corporation, and while they were stockholders thereof; that said payments were not made out of surplus or net profits of said corporation, nor was said corporation then in the process of winding up or dissolution; that said payments were made without the vote or written consent of any of the shares of said corporation other than the shares held by the defendants; that no permit of the Commissioner of Corporations of the State of California was ever applied for or issued authorizing such payments.

## IX.

That this action is not barred by any statute of limitations of the State of California, or otherwise; nor is plaintiff chargeable with any laches in the commencement and maintenance of this action; nor is plaintiff estopped from commencing and maintaining this action.

## X.

That this Court has jurisdiction over this action.

## CONCLUSIONS OF LAW

From the foregoing facts the Court concludes as follows, to wit:

### I.

That all the payments made out of said corporation's funds as above described, were wrongfully and illegally made, and were and are fraudulent in law and void as to plaintiff.

### II.

That defendants shall pay to plaintiff, as trustee in bankruptcy of said corporation, such sum of money which, together with the present assets of the estate of said bankrupt, will suffice to satisfy all just and proper claims and reasonable allowances and expenses in such bankruptcy proceedings, which amount is tentatively estimated at the sum of \$4,500.00.

### III.

That as soon as may be after the payment by defendants of said sum of \$4,500.00 and plaintiff's costs herein, a report shall be filed in this proceeding by the Referee in Bankruptcy, showing the exact amount necessary to satisfy all just and proper claims and reasonable allowances and expenses in the said bankruptcy proceedings, and plaintiff shall thereupon have and recover of and from the defendants, and each of them, the amount, if any, shown by such report to be yet necessary to satisfy all just and proper claims and reasonable allowances and expenses in said bankruptcy proceedings, and plaintiff shall be entitled to have execution therefor; that if such report shows that there is a balance remaining out of said sum of \$4,500.00, after paying all just and proper claims

and reasonable allowances and expenses in said bankruptcy proceedings, the excess thereof, if any, is to be paid to said defendants.

#### IV.

That plaintiff shall have and recover from defendants his costs herein.

Let a decree be made and entered accordingly.

To all of which said defendants, and each of them, except, and exception allowed.

Dated: December 29, 1937.

Leon R. Yankwich  
United States District Judge

Not approved as to form; Decree does not correctly state matters previously determined (see written Statement of objection on file with Clerk.

Homer Johnstone &  
S H Wyse  
Solicitors for Defendant T. E. Klipstein

Dec. 16, 1937

Receipt of a copy of the foregoing Findings of Fact and Conclusions of Law is hereby admitted this 16th day of December, 1937.

Homer Johnstone  
S. H. Wyse  
Solicitors for Defendant T. E. Klipstein

[Endorsed]: Filed Dec. 29, 1937. R. S. Zimmerman,  
Clerk By Louis J. Somers, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

—o0o—

HERBERT P. SEARS, Trustee of the )		
Estate of Globe Drug Company, Inc., )		
Bankrupt, )		No. E-4
	)	
Complainant, )		In Equity
	)	
vs. )		DECREE
LEW O. STELZNER and T. E. )		
KLIPSTEIN, )		
Defendants. )		

—o0o—

The Court having heretofore duly made its Findings of Fact and Conclusions of Law herein:

NOW, THEREFORE, pursuant to such Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed as follows, to wit:

That the plaintiff, Herbert P. Sears, as trustee in bankruptcy of Globe Drug Company, Inc., a corporation, do have and recover of and from the defendants, Lew O. Stelzner and T. E. Klipstein, and each of them, such sum of money which, together with the present assets of the estate of said bankrupt, will suffice to satisfy all just and proper claims and reasonable allowances and expenses in such bankruptcy proceedings, which proceedings are pending in this court and numbered #4171 upon the records of said court, and have heretofore been referred to C. E. Arnold, Esq., Referee in Bankruptcy; that the

plaintiff herein, Herbert P. Sears, as trustee of said bankrupt estate, do presently have and recover of and from the defendants, Lew O. Stelzner and T. E. Klipstein, and each of them, the sum of \$4,500.00.

That as soon as may be after the payment by defendants of said sum of \$4,500.00, together with plaintiff's costs herein, a report shall be filed in this action by said C. E. Arnold, Referee in Bankruptcy, showing the exact amount necessary to satisfy all just and proper claims and reasonable allowances and expenses in the said bankruptcy proceedings, and plaintiff shall thereupon have and recover of and from said defendants, and each of them, the amount, if any, shown by such report to be necessary to satisfy all just and proper claims and reasonable allowances and expenses in said bankruptcy proceedings, and plaintiff shall be entitled to have execution therefor; that if such report shows that there is a balance remaining out of said sum of \$4,500.00, after paying all just and proper claims and reasonable allowances and expenses in said bankruptcy proceedings, the excess thereof, if any, is to be paid to said defendants; but in no event shall plaintiff recover of defendants any amount in excess of said sum of \$4500.00 together with interest at 6 per cent from date of entry of this decree, and costs herein assessed. [L.R.Y., Judge.]

That plaintiff shall have and recover from defendants, and each of them, his costs herein. Cost taxed at \$73.68.

To all of which defendants, and each of them, except, and exception allowed.

Dated: December 29, 1937.

Leon R. Yankwich  
United States District Judge

Not approved as to form by defendant Klipstein for the reason that same do not correctly state matters previously determined (see statement of objections on file with Clerk.

Dec. 16th, 1937

Homer Johnstone and  
S. H. Wyse  
Solicitors for defendant, T. E. Klipstein.

Receipt of a copy of the foregoing Decree is hereby admitted this 16th day of December, 1937.

Homer Johnstone  
S. H. Wyse  
Solicitors for defendant, T. E. Klipstein.

Decree entered and recorded Dec. 29, 1937

R. S. ZIMMERMAN,  
Clerk  
By Louis J. Somers,  
Deputy Clerk

[Endorsed]: Filed Dec. 29, 1937. R. S. Zimmerman,  
Clerk By Louis J. Somers, Deputy Clerk.



[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER TO SHOW CAUSE

TO THE PLAINTIFF, HERBERT P. SEARS,  
AND TO ARTHUR L. SHANNON AND CLARENCE  
A. SHUEY, HIS ATTORNEYS:

Upon reading the verified petition of T. E. Klipstein, one of the defendants in the above entitled cause, and the affidavits of Mel G. Brittan, T. E. Klipstein and Homer Johnstone, copies of which documents are attached hereto, and upon the motion of said Homer Johnstone, attorney for said defendant,

IT IS ORDERED that the plaintiff in said action show cause, if any he have, on the 31st day of March, 1938, at Court Room, Post Office Building, in the City of Fresno, County of Fresno, State of California, why a rehearing should not be granted in said action, or in the alternative, why the findings of fact, conclusions of law, and decree, heretofore entered, should not be modified, in accordance with the prayer of said petition.

Service of this order and the documents described herein shall be made upon the attorneys for plaintiff, either personally or at their office, on or before the 28th day of March, 1938.

Meanwhile, and until further order of this Court, let all proceedings under said decree in said cause be stayed.

Dated this 25th day of March, 1938.

Leon R. Yankwich  
Judge

[Endorsed]: Filed Mar. 25, 1938. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.

At a stated term, to wit: The October Term, A. D. 1937, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Fresno, on Saturday, the 2nd day of April, in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable LEON R. YANKWICH, District Judge.

Herbert P. Sears, Trustee, etc.,	)	
	)	
	)	Plaintiff,
	)	
	)	vs.
	)	No. E-4-Eq.
	)	
Lew O. Stelzner, et al.,	)	
	)	
	)	Defendants.

This cause coming on for hearing on order to show cause, filed March 25, 1938, on petition of T. E. Klipstein for rehearing, or in the alternative, for modification of Findings of Fact, Conclusions of Law and Decree; Arthur L. Shannon, Esq., appearing for the plaintiff; Homer Johnstone, Esq., appearing for petitioner T. E. Klipstein; David E. Peckinpah, Esq., appearing for defendant Lew O. Stelzner, who is also present in court;

Defendant Stelzner joins in the petition for rehearing etc., there being no objections thereto; and Attorney Johnstone argues in support of said petition; Attorney Shannon makes reply thereto; and Attorney Johnstone makes a statement in closing, and thereupon,

It is ordered that the Decree herein be modified as follows: by inserting in line 23, after the word "defendants"—"but in no event shall plaintiff recover of defendants any amount in excess of said sum of \$4500.00, together with interest at 6 per cent from date of entry of this decree, and costs herein assessed" and the decree heretofore entered is modified accordingly, the Court making the change upon the face of the decree.

It is further ordered that the Petition for Rehearing herein be hereby denied and exception allowed to Petitioners. A stay of execution for twenty days is allowed.

It is further ordered that the term of court herein be hereby extended for a period of thirty days from this date within which to prepare Bill of Exceptions herein and for filing same.

[TITLE OF DISTRICT COURT AND CAUSE.]

### STATEMENT OF EVIDENCE

Defendant and appellant T. E. Klipstein herewith presents the following statement of the evidence produced upon the trial of the above-entitled action deemed by said defendant and appellant necessary for the consideration of the errors assigned:

The cause came on for hearing on the 27th day of October, 1937, before the above-entitled Court, at Fresno, California, the Honorable Leon R. Yankwich, Judge presiding, plaintiff appearing by Arthur L. Shannon and Clarence A. Shuey, defendant Lew O. Stelzner by David E. Peckinpah and L. N. Barber, and defendant T. E. Klipstein by Homer Johnstone and Sidney H. Wyse, whereupon the following proceedings were had and the following evidence produced:

A preliminary motion to dismiss said action was made on behalf of defendant T. E. Klipstein upon the ground that the Court had no jurisdiction over said cause, as follows:

“MR. JOHNSTONE: I understand . . . that there is a motion to be made as to the jurisdiction of this court to handle this particular matter, and on behalf of the defendant Klipstein we desire to say that we object to the jurisdiction of this court and that we shall join with the defendant Stelzner in the same motion.

May it be stipulated, Mr. Shannon, that we may join in that motion without it being in a written form?

(Testimony of C. H. Landes)

MR. SHANNON: What motion is that?

MR. JOHNSTONE: A motion to dismiss by reason of lack of jurisdiction.

MR. SHANNON: That motion has been disposed of already.

MR. JOHNSTONE: We propose to renew it at this time. We haven't made any such motion, but by the stipulation to which I referred, we were given the right to present the motion at this time.

MR. SHANNON: All right.

THE COURT: I am going to overrule the motion,  
 . . . ”

C. H. LANDES,

called as a witness for plaintiff, testified as follows: I have been an officer of the Bank of America at Bakersfield, California, for the past 13 years; I am not familiar with any transaction between said bank and the defendants except in so far as the bank records show; said records indicate that on January 3, 1928, a loan of \$17,000.00 was made by said Bank to Lew O. Stelzner, which loan was evidenced by a note in said sum payable April 3, 1928, with interest at the rate of 7 per cent per annum, and that the note was endorsed or secured by the signature of T. E. Klipstein; said records show that payments were made on the principal amount of said loan, upon the dates and in the amounts as follows, to wit:

<u>DATE</u>	<u>AMOUNT</u>
March 29, 1929	\$ 500.00
June 24, 1929	500.00
Sept. 26, 1929	500.00

(Testimony of C. H. Landes)

<u>DATE</u>	<u>AMOUNT</u>
Dec. 24, 1929	\$1,000.00
March 25, 1930	500.00
June 23, 1930	500.00
Sept. 22, 1930	500.00
Dec. 23, 1930	500.00
Mar. 23, 1931	500.00
June 19, 1931	500.00
Sept. 21, 1931	500.00
Dec. 28, 1931	500.00
March 19, 1932	500.00
June 16, 1932	500.00
Dec. 13, 1932	500.00
Aug. 1, 1933	250.00
Sept. 15, 1933	250.00
Jan. 29, 1934	500.00
Feb. 20, 1934	200.00
Mar. 20, 1934	200.00
Apr. 28, 1934	200.00
May 26, 1934	200.00
June 25, 1934	200.00
July 23, 1934	200.00
Aug. 24, 1934	200.00
Sept. 22, 1934	200.00
Oct. 23, 1934	200.00
Nov. 28, 1934	200.00
Dec. 24, 1934	200.00
Jan. 31, 1935	200.00
Feb. 28, 1935	200.00
Mar. 27, 1935	200.00
June 10, 1935	100.00
Aug. 9, 1935	100.00

(Testimony of C. H. Landes)

The record of a separate interest account shows payments of interest on said loan, upon the dates and in the amounts as follows, to wit:

<u>DATE</u>	<u>AMOUNT</u>
April 3, 1928	\$ 300.81
July 6, 1928	304.11
Oct. 1, 1928	297.50
Nov. 24, 1928	12.60
March 29, 1929	294.24
June 24, 1929	291.19
Sept. 26, 1929	280.00
Dec. 24, 1929	271.25
Mar. 25, 1930	253.75
June 23, 1930	245.00
Sept. 22, 1930	238.82
Mar. 23, 1931	208.75
Sept. 21, 1931	201.25
Dec. 28, 1931	192.50
Mar. 9, 1932	184.15
June 16, 1932	175.00
Sept. 14, 1932	166.25
Dec. 13, 1932	166.25
July 10, 1933	32.42
Aug. 1, 1933	47.25
Sept. 15, 1933	15.74

(Testimony of C. H. Landes)

	<u>DATE</u>	<u>AMOUNT</u>
Oct.	19, 1933	\$ 47.93
Jan.	29, 1934	170.23
Feb.	20, 1934	34.22
Mar.	20, 1934	42.47
Apr.	28, 1934	44.43
Mar.	26, 1934	43.16
June	25, 1934	43.40
July	23, 1934	40.83
Aug.	24, 1934	40.99
Sept.	22, 1934	39.79
Oct.	23, 1934	34.85
Nov.	24, 1934	37.38
Dec.	24, 1934	35.00
Jan.	31, 1935	32.70
Feb.	28, 1935	33.66
Mar.	27, 1935	29.40
Apr.	30, 1935	31.35
June	10, 1935	29.17
Aug.	9, 1935	74.32;

from the notations contained thereon certain checks can be identified as having been applied on said principal and interest accounts.

The checks so identified by Mr. Landes were offered into evidence in a group as Plaintiff's Exhibit 1, over the objection of defendant T. E. Klipstein, as follows:

"MR. SHANNON: I am going to introduce all of these checks as Plaintiff's Exhibit 1, as one exhibit.

MR. JOHNSTONE: We object, may it please the court, to the introduction in evidence of these checks on the ground that they are incompetent, irrelevant and immaterial and if offered for any purpose it is to show pay-



(Testimony of C. H. Landes)

ments of more than three years prior to the filing of the within action, and therefore the Statute has run against the cause of action; and upon the further ground that there is no identification of the defendant Klipstein with the Globe Drug Company.

THE COURT: All right. The objection will be overruled.

THE CLERK: 1, in evidence.

MR. JOHNSTONE: Exception."

Said Plaintiff's Exhibit 1 consists of 15 checks, each drawn on Bank of America National Trust & Savings Association in favor of Bank of America National Trust & Savings Association by Globe Drug Company, Inc., by Lew O. Stelzner, said checks having been drawn on the following dates and for the following amounts respectively:

<u>DATE OF ISSUE</u>	<u>AMOUNT</u>
Jun. 16, 1932	\$675.00
Sep. 13, 1932	166.25
Dec. 13, 1932	666.25
Mar. 15, 1933	157.50
Jun. 10, 1933	157.50
Jul. 10, 1933	42.00
Aug. 1, 1933	297.25
Sep. 15, 1933	302.74
Oct. 3, 1933	29.75
Oct. 19, 1933	47.93
Jan. 29, 1934	170.23
Feb. 20, 1934	234.22
Jan. 31, 1935	232.70
Feb. 28, 1935	233.66
Mar. 27, 1935	229.40

(Testimony of C. H. Landes)

Mr. Landes further testified: On October 19, 1935, the balance in said loan account was \$4,800.00; on said day said balance was paid in full by the note of the Globe Drug Company, endorsed or secured by the signature of T. E. Klipstein, in the sum of \$4,800.00.

The witness further testified that he could not locate any records that would indicate that Globe Drug Company, up to October 19, 1935, had any loan or outstanding loans with the bank.

Mr. Landes then identified photostatic copies of certain original records pertaining to the said loan transaction and said copies were offered into evidence as Plaintiff's Exhibit 3. Said exhibit shows what purports to be a loan account in the name of Lew O. Stelzner on the books of Bank of America National Trust & Savings Association; that on the 3rd day of January, 1928, a loan in the sum of \$17,000.00, was made; that said amount was reduced from time to time until the 19th day of October, 1935, when the balance remaining was \$4,800.00; that said balance was paid on that date. Said account carries in the margin the notation that said account is "endorsed or secured" by T. E. Klipstein.

It was thereupon stipulated by and between counsel for plaintiff and counsel for defendant and appellant T. E. Klipstein that the note of the Globe Drug Company was paid in full by said defendant and appellant T. E. Klipstein.

(Testimony of Richard A. Pawson)

RICHARD A. PAWSON,

called as a witness for plaintiff, testified: I am the assistant credit manager and in charge of the customers' accounts receivable ledger of McKesson & Langley; I am familiar with the account of the Globe Drug Company; I have made a comparison of the dates on which payments were made on the \$17,000.00 loan transaction, as testified to by Mr. Landes, with the state of the account of the Globe Drug Company.

Thereupon the following question was asked of the witness and the following proceedings had:

“MR. SHANNON: Now, during the recess, have you made a comparison between all the dates of payment of the \$17,000.00 obligation testified to by Mr. Landes, and a comparison of the dates of those payments with the condition of the account of the Globe Drug Company on those corresponding dates?”

WITNESS: I did.

MR. SHANNON: And what did you find with respect to the account of the Globe Drug Company, how it stood, whether there was a debit balance or whether it was paid up?

MR. JOHNSTONE: Just a minute; to which we object on the ground it is incompetent, irrelevant and immaterial and hearsay as to defendant Klipstein, and for the further ground that before this evidence is admissible, may it please the court, they must show that

(Testimony of Richard A. Pawson)

Klipstein had knowledge of some insolvent condition if there was any insolvent condition. Under any circumstances he could not be charged with knowledge of preference.

THE COURT: Overruled.

MR. JOHNSTONE: Note an exception."

Plaintiff's Exhibit 4 was thereupon introduced into evidence over the objection of defendant T. E. Klipstein, as follows:

"MR. SHANNON: Now, Mr. Pawson, did you make a form of capitulation, or list of those claims and the condition of the account of the Globe Drug Company?

MR. PAWSON: Yes, I did.

MR. SHANNON: Did you reduce it to writing on a piece of paper?

MR. PAWSON: Yes.

MR. SHANNON: Have you it with you?

MR. PAWSON: Yes.

MR. SHANNON: Now, you refer to that list having before you the dates of the payments on the \$17,000.-00 account, and the amount of those payments, is that correct?

MR. PAWSON: Yes.

MR. SHANNON: And those figures that you have set forth on that statement, showing the condition of the

(Testimony of Richard A. Pawson)

accounts, the debit balances of the Globe Drug Company on those particular dates, is that right?

MR. PAWSON: Yes.

MR. SHANNON: We offer it in evidence.

MR. JOHNSTONE: To which we object on the ground it is incompetent, irrelevant and immaterial and is not binding on the defendant Klipstein. There has been nothing to bring him within the action at the present time. He is not a stockholder, not a director, and if it is offered for the purpose of showing any apparent insolvent condition of the corporation, this is not the way to do it. They should show, for instance—I call your Honor's attention to the situation as it now stands, and that we believe will be shown here, that there never was any capital stock liability of the corporation; there never was any insolvent condition from a technical or actual standpoint, in all this period of time they have been bringing in evidence before here.

THE COURT: Overruled.

MR. JOHNSTONE: Exception."

Said Plaintiff's Exhibit 4 consists of several pages of note paper containing the following words and figures, in pencil:

(Testimony of Richard A. Pawson)

“Interest payments

Globe Drug Company

1601 — 19th St.

Bakersfield, California

<u>DATE</u>	<u>BALANCE OUTSTANDING</u>
	<u>McKESSON</u>
4/ 3/28	\$ 884.22
7/ 6/28	790.76
10/ 1/28	629.34
11/24/28	1,154.71
3/29/29	693.74
6/24/29	1,163.16
9/22/29	1,332.75
12/24/29	1,850.96
3/25/30	923.46
6/23/30	1,607.22
9/22/30	1,422.44
3/23/31	1,492.74
9/21/31	1,565.34
9/28/31	1,103.76
3/19/32	1,264.92
6/16/32	986.32
9/14/32	899.86
12/13/32	1,697.23

## (Testimony of Richard A. Pawson)

7/10/33	1,433.25
8/ 1/33	1,717.11
12/15/33	1,535.18
10/19/33	1,795.49
1/29/34	1,496.45
2/20/34	1,630.81
3/20/34	1,520.27
4/28/34	1,373.28
3/26/34	1,453.26
6/25/34	1,137.31
7/23/34	996.53
8/24/34	845.23
9/22/34	808.99
10/23/34	1,468.61
11/24/34	1,649.92
12/24/34	2,068.52
1/31/35	1,472.29
2/28/35	1,746.98
3/27/35	1,943.21
4/30/35	2,135.50
6/10/35	1,620.45
8/ 7/35	1,307.56
10/30/35	1,314.02
12/ 2/35	1,314.02''

(Testimony of Richard A. Pawson)

"Payments

Principal

<u>DATE</u>	<u>BALANCE DUE McKESSON</u>
3/29/29	\$ 693.74
6/24/29	1,163.16
9/26/29	1,102.83
12/24/29	1,850.96
3/25/30	923.46
6/23/30	1,607.22
9/22/30	1,422.44
12/23/30	1,986.22
3/23/31	1,492.74
6/19/31	1,255.78
9/21/31	1,565.34
12/28/31	568.95
3/19/32	1,264.92
6/16/32	986.32
12/13/32	1,697.23
8/ 1/33	1,717.11
9/15/33	1,655.51
1/29/34	1,496.45
2/20/34	1,630.81
3/20/34	1,520.27
4/28/34	1,373.28
5/26/34	1,237.37
6/25/34	1,137.31
7/23/34	996.53
8/24/34	845.23



(Testimony of Richard A. Pawson)

9/22/34	808.99
10/23/34	1,468.61
11/28/34	1,767.04
12/24/34	2,068.52
1/31/35	1,472.29
2/28/35	1,746.98
3/27/35	1,943.21
6/10/35	1,620.45
8/ 9/35	1,307.56
10/19/35	1,314.02"

Thereupon the following questions were asked of the witness and the following proceedings had:

“MR SHANNON: Did you, or your firm, file a claim in the bankruptcy proceedings of the Globe Drug Company, Inc.?”

MR. PAWSON: Yes. We filed our claim in the San Francisco Board of Trade.

MR. SHANNON: Do you remember the amount of that claim?

MR. PAWSON: \$1,314.02.

\* \* \* \* \*

MR. BARBER: Do you know whether, as a matter of fact, you filed your claim with the Board of Trade before the bankruptcy proceedings were commenced or after?

MR. PAWSON: I can't answer that question.”

(Testimony of Lew O. Stelzner)

LEW O. STELZNER,

one of the defendants, called as a witness for plaintiff, testified: I was an officer and director of the Globe Drug Company.

Thereupon Plaintiff's Exhibit 5 was offered into evidence over the objection of defendant T. E. Klipstein, as follows:

"MR. SHANNON: Now, Mr. Stelzner, do you recognize that book?

MR. STELZNER: (Examining document) Yes, I do.

MR. SHANNON: Is that the minute book of the Globe Drug Company, Inc.?

MR. STELZNER: It is.

MR. SHANNON: We are going to offer this in evidence, your Honor, the whole book for what it is worth to either side in this case, as Plaintiff's Exhibit next number in order.

MR. JOHNSTONE: We object to its introduction on the ground it is incompetent, irrelevant and immaterial and upon the grounds stated before, that the corporation has never been organized and the document itself it not the official record of the corporation that has completed its organization, and upon the ground that as to the defendant Klipstein it is entirely hearsay.

THE COURT: The objection is overruled.

MR. JOHNSTONE: Exception."

Said Plaintiff's Exhibit 5 shows that Globe Drug Company, Inc., was incorporated in the State of California on the 17th day of July, 1920, by Lew O. Stelzner, V. J.

(Testimony of Lew O. Stelzner)

Moore and James F. Brazill, with an authorized capital stock of \$25,000.00 divided into 25,000 shares of the par value of \$1.00 each, and with a Board of Directors consisting of three members. Written entries in said minute book purport to record the following transactions:

On December 31, 1927, at a stockholders' meeting of Globe Drug Company, Inc., Vergne J. Moore, Lew O. Stelzner, and G. D. Holmquist, holding 24,980 shares, were present and voting, T. E. Klipstein, Lew O. Stelzner, and Dorothy I. Stelzner were nominated and elected directors of the corporation for the ensuing year.

On December 31, 1927, at a Directors Meeting of Globe Drug Company, Inc., Lew O. Stelzner, T. E. Klipstein and Dorothy I. Stelzner being present and acting, T. E. Klipstein was nominated and elected Vice-President of the corporation.

On January 4, 1928, at a Directors Meeting of Globe Drug Company, Inc., Lew O. Stelzner, T. E. Klipstein and Dorothy I. Stelzner being present and acting, T. E. Klipstein was nominated and elected Secretary of the corporation; the minutes of said meeting were attested by the signature of T. E. Klipstein, Secretary.

From and after January 23, 1928, there is no record of any meetings of directors or stockholders of Globe Drug Company, Inc., until October 19, 1935, on which date was held a directors meeting, Lew O. Stelzner, T. E. Klipstein and Dorothy I. Stelzner being present, at which meeting a resolution was passed authorizing the corporation to borrow from the Bank of America National Trust & Savings Association the sum of \$5,000.00; T. E. Klipstein signed his consent to the holding of said meeting as

(Testimony of Lew O. Stelzner)

a director, and was present and acting. The minutes of said meeting were attested by the signature of T. E. Klipstein, Secretary.

No further proceedings appear in said Minute Book.

Thereupon Plaintiff's Exhibit 6 was offered into evidence over the objection of defendant T. E. Klipstein, as follows:

"MR. SHANNON: Mr. Stelzner, isn't this what purports to be a stock certificate book? Look at it and see if you can recognize that.

MR. STELZNER: (Examining document.) Yes.

MR. SHANNON: Is that the stock certificate book of the Globe Drug Company?

MR. JOHNSTONE: To which we object on the grounds already stated, that, if it is a part of the plaintiff's case here, if we are going to, for any purpose at all, show that, they must show, as a part of their case, that Klipstein was a stockholder, and then the way to do it is to show that he had legal stock issued to him. They cannot by documents of this kind, made without authority of law, tie him in as a stockholder.

MR. SHANNON: We offer in evidence the stock book as the next in order.

MR. SHANNON: The stock book is admitted?

THE COURT: Yes.

MR. JOHNSTONE: An exception."

Certain stubs in said Plaintiff's Exhibit 6, from which certificates of stock have been detached, contain notations purporting to show that said detached certificates

(Testimony of Lew O. Stelzner)

had been issued on the following dates, for the following number of shares, and to the following persons respectively:

CERTIF.

<u>NO.</u>	<u>DATED</u>	<u>NO. SHARES</u>	<u>ISSUED TO</u>
12	Jun 30, 1927	3000	Lew O. Stelzner
13	Dec 21, 1927	10	T. E. Klipstein
17	Jan 5, 1928	9990	T. E. Klipstein
19	Jun 14, 1932	5	Lew O. Stelzner
20	Jun 14, 1932	5	Dorothy I. Stelzner
21	Jun 14, 1932	3996-2/3	Thomas Lew Stelzner
22	Jun 14, 1932	3996-2/3	Gretchen Stelzner
23	Jun 14, 1932	3996-2/3	Mary Jean Stelzner

Said stub No. 17 bears the following notation: 'Received Certificate No. 17 for 9,990 shares this 16th day of January, 1928,' such notation being signed by T. E. Klipstein.

Mr. Stelzner further testified: I am the beneficial owner of the shares evidenced by certificates Nos. 21, 22 and 23, in the names of Thomas Lew Stelzner, Gretchen Stelzner and Mary Jean Stelzner, respectively; they are my children; T. E. Klipstein is my brother-in-law; the note for \$17,000.00 given the Bank of America was signed by me and by Mr. Klipstein as joint makers; I received the proceeds of said loan and used the same to buy the stock held by the two other stockholders of the Globe Drug Company; all of the payments testified to by Mr. Landes as having been made upon said loan had been made from "store funds", corporate funds; said Company issued its note in the sum of \$4,800.00 in pay-

(Testimony of Lew O. Stelzner)

ment of the balance of said loan on October 19, 1935; nothing was received by said Company in consideration for payments on the \$17,000.00 note or for the execution of the \$4,800.00 note; the corporation used the corporate funds to pay for the stock that I bought; I was served with a summons and complaint in the action of T. E. Klipstein v. Globe Drug Company, Inc., in the Superior Court for Kern County; I had not talked with T. E. Klipstein prior to said service and I knew nothing concerning said suit prior to said service; I took said copy of the summons and complaint in said action to my attorneys; I do not know what my attorneys did with said documents and to my knowledge no defense was put in on behalf of the Globe Drug Company; I had no real defense to said action and I knew that the money was owed to Mr. Klipstein and that I "just had to get out".

A certified copy of the judgment roll in said action was introduced into evidence as Plaintiff's Exhibit 7. Said exhibit shows that on the 19th day of October, 1935, an action was brought in the Superior Court of the State of California in and for the County of Kern, by T. E. Klipstein against Globe Drug Company, Inc., for the recovery of the sum of \$5,364.00 alleged to be due from the defendant to plaintiff for moneys advanced to defendant, that the complaint in said action was verified by T. E. Klipstein, that said Globe Drug Company, Inc., was the only party defendant in said action, that service of the summons and complaint in said action was made on the 19th day of October, 1935, at Bakersfield, upon Lew O. Stelzner, individually and as President of Globe Drug Company, Inc., that the default of defendant was entered on the 5th day of November, 1935, and that judg-

(Testimony of Lew O. Stelzner)

ment against defendant and in favor of plaintiff in the sum of \$5,383.82 and \$177.00 costs was entered on the 8th day of November, 1935.

Mr. Stelzner further testified: The note for \$17,000.00 was signed by Mr. Klipstein as a personal accommodation to me and Mr. Klipstein never received any part of said moneys or anything else for said accommodation and had no interest in the drug business; no permit had ever been issued by the Corporation Commissioner of the State of California authorizing said Company to issue its shares.

A schedule in bankruptcy of the Globe Drug Company, Inc., was identified by Mr. Stelzner as that filed by him on behalf of said Company and was offered into evidence as Plaintiff's Exhibit 8.

Said Plaintiff's Exhibit 8 contains the following summary of the debts and assets of the bankrupt:

Summary of Debts and Assets

Taxes and Debts due U. S.	None
Taxes due States, Counties, Districts and Municipalities	\$ 163.35
Wages	600.00
Unsecured claims	10,280.52
Total debts	<u>\$11,043.87</u>
Cash on hand	\$ 1,881.48
Debts due on Open Accounts	2,104.15
Total assets	<u><u>\$ 3,985.63</u></u>

Said Plaintiff's Exhibit 8 further shows that included in the Unsecured Claims against said bankrupt is an item in the sum of \$5,708.90, concerning which there appears the following notation:

(Testimony of Lew O. Stelzner)

“T. E. Klipstein, Brower Bldg., Bakersfield, California. This debt is represented by a judgment obtained on November 7, 1935 by the creditor against the corporation in an action filed in the Superior Court of the State of California, in and for the County of Kern, entitled “T. E. Klipstein, plaintiff, vs. Globe Drug Company, Inc., a corporation, Defendant,” being Action Number 29015, for moneys advanced by said creditor to the corporation from time to time during the last four years; that an execution was issued upon this judgment and the fixtures and merchandise of the debtor were sold upon the same; that at said sale the sum of \$1,935.00 was realized; that said money received from the sale, less the fees and expenses of said sale in the sum of \$608.75 is being held by said judgment creditor for the benefit of all of the creditors in proportion to their claims”

Said Plaintiff's Exhibit 8 further shows an item of \$1,316.31 included in the list of personal property, concerning which item there appears the following notation: ‘Held by Brittan and Mack, attorneys for the benefit of creditors.’

Said Plaintiff's Exhibit 8 further shows an item of \$565.17 included in the list of personal property, concerning which item there appears the following notation:

“Held by D. D. Cornwell, deputy Constable, to be returned for the benefit of the creditors. This amount was taken upon execution in an action entitled “T. E. Klipstein, plaintiff, vs. Globe Drug Company, Inc., a corporation, defendant”, being an action brought in the Superior Court of the State of California, in and for the County of Kern, being action No. 29015, and the



(Testimony of Lew O. Stelzner)

judgment creditor in said action, Mr. T. E. Klipstein, of Bakersfield, California, has agreed with all of the creditors that this amount may be ratably distributed among the creditors in proportion to their claims.”

Among the list of unsecured claims set forth in said schedule is one of McKesson, Langley and Michaels Co. for \$1,314.02.

Plaintiff thereupon rested.

A motion to dismiss plaintiff's complaint was then made on behalf of T. E. Klipstein, as follows:

“MR. JOHNSTONE: May it please the court, on behalf of the defendant Klipstein, we move to dismiss as against that defendant on the grounds heretofore urged at the outset of the case: First, that this action is one that the cause of action is given to the trustee in bankruptcy, unquestionably by the Civil Code of this State, but he has mistaken the forum in which to try the action. The federal court, as such, has no jurisdiction over this type of action in the face of an objection by the defendant. I will not urge that argument further. I think the case is on all fours with the case decided by Justice Holmes.

On the further ground, may it please the court, as to the first cause of action, the defendant Klipstein cannot be held in this action for the reason that it shows if any moneys were paid to any person they were paid to the bank, and not to the defendant Klipstein. Klipstein cannot be held in this action on the theory that he received property that was taken, admittedly, for the sake of argument,

(Testimony of Mr. T. E. Klipstein)

from the corporation's funds by the defendant Stelzner, and paid out on Stelzner's primary liability to the Bank.

We make the further objection, and ask the court to include it as one of the grounds of our motion to dismiss, that there has been absolutely no showing that Klipstein was a director, either de facto or otherwise, in view of the failure on the part of the plaintiff to show that there was ever a valid bona fide issue of stock. The minute book purports to show that Klipstein was elected at a meeting of the stockholders. There could have been no meeting of the stockholders unless there were valid shares issued under the laws as they stood at that time.

We make the further objection and ask to dismiss upon the ground that the cause of action, if it be under Section 363, or Section 366, is barred by the Statute of Limitations by the Civil Code of the State of California, Section 338, subdivisions 1 and 4."

THE COURT: The motions will be denied, gentlemen Exceptions to the parties."

MR. T. E. KLIPSTEIN,

defendant and appellant, was called as a witness for the defense and testified: In 1928 I aided Lew O. Stelzner in procuring the \$17,000.00 from the Bank of America to buy out his partners; I was in the title business and had no interest in the drug company; the \$17,000.00 was received by Mr. Stelzner; I never received any consideration of any kind for placing my name on said note; I never knew the Company had any unpaid creditors until several months immediately prior to filing the action of T. E. Klipstein v. Globe Drug Co.; I did not make any

(Testimony of Mr. T. E. Klipstein)

investigation to determine who the creditors were but subsequent to the filing of said action it was my understanding that all creditors were notified; the \$17,000.00 loan had been paid down to \$4,800.00 by Mr. Stelzner and at that time he was behind in his payments and I demanded that the corporation give me the \$4,800.00 note to protect me; I at all times regarded Mr. Stelzner and Globe Drug Company as one and the same; my action against the Company was filed on advice of my attorney; at that time Mr. Stelzner wasn't able to pay his rent, was going into the hole from day to day, had a depleted stock of goods and no credit, and said action was brought for the good of Stelzner and everyone else; there is no question but that a saving was effected; the note of Globe Drug Company for \$4,800.00 was never paid and was given back by me to the Company; that amount sued for, \$5,364.00, in my action against the Company covered the \$4,800.00 note and some \$500.00 which I paid when Mr. Stelzner was behind in his payments to the bank in 1934; said action was brought to protect the Globe Drug Company from any further losses; all the creditors were sent a notice that they would share equally; I had no intention of taking any advantage by reason of the judgment; I instructed my attorney to file a claim in the bankruptcy proceedings of the Globe Drug Company and I further instructed my attorney to offer to waive said claim at the creditor's meeting; I was not at such meeting; the property of the Company was sold pursuant to an attachment issued in said action; prior to the sale the stock and fixtures were appraised by a druggist at \$2,200.00; 11 or 12 persons bid at the sale and that the sheriff accepted the highest bid from a Mr. Vest; the

(Testimony of Mr. T. E. Klipstein)

proceeds of said sale less costs and expenses were turned over to the trustee in bankruptcy and that nothing had ever been paid on the judgment.

Mr. Klipstein further testified on cross-examination; I do not remember whether Certificate No. 17 for 9,990 shares of Globe Drug Company stock was issued to me; I presume it was as shown by the stub but I do not have the certificate;

(At this point the minutes of the meetings of January 4, 1928 and October 19, 1935 were read to the witness.)

I am not familiar with the minutes of the Company but I signed the minutes of the directors meeting of January 4, 1928, and October 19, 1935, as shown in the minute book, Plaintiff's Exhibit 5; to the best of my knowledge I was made a director of the Company sometime in January of 1928 I think; there were no meetings after that until the meeting held on October 19, 1935; the Company's note for \$4,800.00 was executed pursuant to a resolution passed at said latter meeting; I signed the note as secretary of the Company; I presume the company weren't getting anything for the execution of that note; there wasn't any money exchanged; at the time I instructed my attorneys to bring suit against the Globe Drug Company I did not know that the same attorneys were also attorneys for the Company; I considered the judgment in said action a judgment against Lew O. Stelzner; I had a claim against Stelzner for \$4,800.00 on the note and \$500 advanced during 1934; I told my attorneys to protect me in any possible way and left it to them; said attorneys said nothing about not being able to represent me; my understanding from my

(Testimony of Mr. T. E. Klipstein)

attorneys was that all creditors were notified that suit was going to be brought; I have seen copies of letters written to some of the creditors; I don't know if they were sent out to all the creditors; savings to the creditors were effected by said suit; I was one of the creditors of Mr. Stelzner along with the others; I cannot get it out of my mind that Mr. Stelzner was the Globe Drug Company; I recognize a note given by me to the Bank of America, for \$4,800.00; said note was given to the bank in connection with the balance of \$4,800.00 on the \$17,000.00 loan; said note was exchanged at the bank for the \$4,800.00 of the Globe Drug Company; said note was paid by me with my own funds.

Said note was thereupon offered into evidence as defendant Klipstein's Exhibit A, being a promissory note in words and figures as follows:

"\$4800.00                      Bakersfield, Calif Oct 10, 1935

On January 9, 1936, for value received, I promise to pay in lawful money of the United States of America, to the order of the Bank of America National Trust & Savings Association at its office in this city Forty-eight hundred Dollars, with interest from date at the rate of 7 per cent per annum until paid. Payable on January 9, 1936 and . . . . . thereafter, and in addition thereto in the event of commencement of suit to enforce payment of this note, such additional sums as attorneys' fees as the court may adjudge reasonable.

(Signed) T. E. KLIPSTEIN"

Mr. Klipstein further testified: It is my understanding that for a period of several months there was an attempt to bring about a composition of creditors to

(Testimony of Mr. Herbert B. Sears)

prevent bankruptcy proceedings in regard to the Globe Drug Company; I think my attorney and Mr. Sears, the plaintiff in this action, represented all of the creditors.

It was stipulated by and between counsel for plaintiff and counsel for defendant and appellant T. E. Klipstein that the Corporation Commissioner of the State of California, if called as a witness for defendant would testify in accordance with the terms of a certain telegram offered into evidence as defendant Klipstein's Exhibit B, and being as follows:

“SACRAMENTO CALIF Oct. 21, 1937

HOMER JOHNSTONE

BARTLETT BLDG            LOSA

GLOBE DRUG COMPANY FILED APPLICATION  
IN 1920 BUT NO PERMIT ISSUED

J. T. MC MENAMIN”

MR. HERBERT B. SEARS,

plaintiff in this action, was called as a witness for defendants and testified: I remember a meeting of creditors held in my office in an attempt to adjust the matters of the bankruptcy; I have in my possession a carbon copy of a letter written by me to the creditors; this letter was sent to the Board of Trade at San Francisco and the Los Angeles Wholesalers' Board of Trade; the letter is dated November 4, 1935; I don't believe I could tell you whether or not the creditors whose names were included in any schedule on file with me were given copies of this letter; Howard

(Testimony of Mr. Herbert B. Sears)

Cravath, T. E. Klipstein and I were the members of a committee of creditors; I generally represent the said Boards of Trade and I figured that said Boards of Trade would be in touch with all creditors; said Boards of Trade send out a regular notification sheet to all creditors; I have in my possession a copy of a letter dated November 14, 1935, which was sent to some of the creditors; I really can't say whether it was a regular circular letter or not; it might not contain anything of value; here is one paragraph:

“This office has been asked by Mr. Brittan, to handle the disbursement of the proceeds from the sale to the various creditors on a pro rata basis, which we have agreed to do. Therefore, if you will kindly file your claim for your account either with the Board of Trade of San Francisco or the Los Angeles Wholesalers' Board of Trade, or with this office, the same will be taken care of. If it is filed with either one of the Boards of Trade they will send the claim to this office as we represent them in this vicinity.”; I was informed that it was the filing of the attachment suit that brought on the bankruptcy proceeding; the records of the Globe Drug Company, when they came into my hands, were very incomplete, very difficult to examine or ascertain anything from; we had quite a bit of trouble; the cancelled checks that were introduced this morning were all that I was able to find; I had looked for others, but couldn't find them.

All parties thereupon rested.

## ORDER SETTLING STATEMENT OF EVIDENCE

It appearing to the Court that defendant and appellant T. E. Klipstein has filed herein his Statement of Evidence in said cause, together with the admission of service of counsel for plaintiff and appellee Herbert P. Sears of copies of said Statement of Evidence and of Notice of Lodgment thereof, and said plaintiff and appellee Herbert P. Sears having filed his Proposed Amendments to said Statement of Evidence, and said Statement of Evidence and said Proposed Amendments having been duly presented to the Court, pursuant to notice duly given, and the same having been duly considered by the Judge of this Court who presided at the trial of said cause, and said Statement of Evidence having been amended pursuant to the direction of said Judge, and the same, as amended, appearing to contain all of the material evidence in said cause and to be in all respects complete and proper;

IT IS ORDERED AND CERTIFIED that the above and foregoing instrument denominated Statement of Evidence and composed of pages 1 to 23 inclusive be and the same is hereby approved, settled and allowed as the Statement of Evidence in the above-entitled cause.

Done at Los Angeles, California, this 18th day of July, 1938.

Leon R. Yankwich  
Judge.

[Endorsed]: Filed Jul. 18, 1938 R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk.



[TITLE OF DISTRICT COURT AND CAUSE.]

STIPULATION FOR ORDER OF SEVERANCE

IT IS HEREBY STIPULATED by and between defendant T. E. Klipstein and defendant Lew O. Stelzner, through their respective attorneys, that defendant Lew O. Stelzner has been duly notified and requested by defendant T. E. Klipstein to join with said defendant in a petition for an appeal from the decree hitherto made and entered in the above entitled cause, that defendant Lew O. Stelzner has failed and refused to join in said appeal, and that an order may be made and entered by the above entitled Court granting leave to defendant T. E. Klipstein to prosecute his said appeal without joining defendant Lew O. Stelzner as a party appellant.

Dated this 10th day of May, 1938.

HOMER JOHNSTONE

SIDNEY H. WYSE

By Homer Johnstone

Attorneys for defendant T. E. Klipstein

DAVID E. PECKINPAH

L. N. BARBER

By L. N. Barber

Attorneys for defendant Lew O. Stelzner

[Endorsed]: Filed May 20, 1938 R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk

[TITLE OF DISTRICT COURT AND CAUSE.]

ORDER OF SEVERANCE

Upon reading and filing the Stipulation heretofore entered into by and between defendant T. E. Klipstein and defendant Lew O. Stelzner, through their respective attorneys, and it appearing therefrom that said defendant T. E. Klipstein has duly notified and requested said defendant Lew O. Stelzner to join with said defendant T. E. Klipstein in an appeal from a decree of this Court made and entered in the above entitled cause and that said defendant Lew O. Stelzner has failed and refused so to join in such appeal,

IT IS HEREBY ORDERED that defendant T. E. Klipstein be allowed to prosecute said appeal alone, without joining defendant Lew O. Stelzner as a party appellant, and that the appeal of said defendant T. E. Klipstein is hereby severed for such purpose.

Dated this 20th day of May, 1938.

Leon R Yankwich

Judge of the United States District Court for the  
Southern District of California, Northern  
Division.

[Endorsed]: Filed May 20, 1938 R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES, IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

—ooOoo—

HERBERT P. SEARS, Trustee :	
of the Estate of Globe Drug :	
Company, Inc., Bankrupt, :	
	: No. E-4
Complainant, :	In Equity
	: PETITION FOR
vs. :	APPEAL AND
	: ORDER
LEW O. STELZNER and :	ALLOWING
T. E. KLIPSTEIN, :	APPEAL
	:
Defendants. :	
. . . . .	

To the Honorable Leon R. Yankwich, Judge of the United  
States District Court for the Southern District of  
California:

Your petitioner, T. E. Klipstein, one of the defendants  
in the above entitled action, respectfully shows:

That he is aggrieved by the decree entered in said  
cause on the 29th day of December, 1937, as modified  
and amended by an order of this Court made and entered  
on the 2nd day of April, 1938; that the errors upon which  
your petitioner proposes to base his appeal are contained  
in an assignment of errors filed herewith.

Wherefore, your petitioner prays that he be allowed to appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit; that a citation be issued in accordance with law; that an authenticated transcript of the record, proceedings and exhibits on the trial be forwarded to the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California;

And your petitioner further prays that an order be made fixing the amount of security to be given by appellant as provided by law and that execution on said decree be superseded until final determination of said appeal.

Homer Johnstone

Sidney H. Wyse

Attorneys for Defendant and Appellant T. E. Klipstein

IT IS ORDERED that an appeal herein be allowed upon appellant furnishing a bond on appeal in the amount of Six Thousand (\$6000.00) Dollars, the same to operate as a supersedeas as well as a bond for costs and damages.

By the Court:

Leon R. Yankwich

Judge

[Endorsed]: Filed Apr. 25, 1938. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk

[TITLE OF DISTRICT COURT AND CAUSE.]

## ASSIGNMENT OF ERRORS

Comes now T. E. Klipstein, defendant and appellant herein, and files the following assignment of errors upon which he will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

### I

The Court erred in denying defendant's motion to dismiss plaintiff's complaint herein, as follows:

"MR. JOHNSTONE: I understand . . . that there is a motion to be made as to the jurisdiction of this court to handle this particular matter, and on behalf of the defendant Klipstein we desire to say that we object to the jurisdiction of this court and that we shall join with the defendant Stelzner in the same motion.

May it be stipulated, Mr. Shannon, that we may join in that motion without it being in a written form?

MR. SHANNON: What motion is that?

MR. JOHNSTONE: A motion to dismiss by reason of lack of jurisdiction.

MR. SHANNON: That motion has been disposed of already.

MR. JOHNSTONE: We propose to renew it at this time. We haven't made any such motion, but by the stipulation to which I referred, we were given the right to present the motion at this time.

MR. SHANNON: All right.

THE COURT: I am going to overrule the motion,  
 . . ."

## II

The Court erred in overruling defendant's objection to the introduction into evidence of Plaintiff's Exhibit 1, as follows:

"MR. SHANNON: I am going to introduce all of these checks as Plaintiff's Exhibit 1, as one exhibit.

MR. JOHNSTONE: We object, may it please the Court, to the introduction in evidence of these checks on the ground that they are incompetent, irrelevant and immaterial and if offered for any purpose it is to show payments of more than three years prior to the filing of the within action, and therefore the Statute has run against the cause of action; and upon the further ground that there is no identification of the defendant Klipstein with the Globe Drug Company.

THE COURT: All right. The objection will be overruled.

THE CLERK: 1, in evidence.

MR. JOHNSTONE: Exception."

## III

The Court erred in overruling defendant's objection to the question asked plaintiff's witness, Mr. Pawson, on direct examination, as follows:

"MR. SHANNON: Now, during the recess, have you made a comparison between all the dates of payment of the \$17,000.00 obligation testified to by Mr. Landes, and a comparison of the dates of those payments with the condition of the account of the Globe Drug Company on those corresponding dates?

WITNESS: I did.

MR. SHANNON: And what did you find with respect to the account of the Globe Drug Company, how it stood, whether there was a debit balance or whether it was paid up?

MR. JOHNSTONE: Just a minute; to which we object on the ground it is incompetent, irrelevant and immaterial and hearsay as to defendant Klipstein, and for the further ground that before this evidence is admissible, may it please the court, they must show that Klipstein had knowledge of some insolvent condition if there was any insolvent condition. Under any circumstances he could not be charged with knowledge of preference.

THE COURT: Overruled.

MR. JOHNSTONE: Note an exception."

#### IV

The Court erred in overruling defendant's objection to the introduction into evidence of Plaintiff's Exhibit 4, as follows:

"MR. SHANNON: Now, Mr. Pawson, did you make a form of capitulation, or list of those claims and the condition of the account of the Globe Drug Company?

MR. PAWSON: Yes, I did.

MR. SHANNON: Did you reduce it to writing on a piece of paper?

MR. PAWSON: Yes.

MR. SHANNON: Have you it with you?

MR. PAWSON: Yes.

MR. SHANNON: Now, you refer to that list having before you the dates of the payments on the \$17,000.00

account, and the amount of those payments, is that correct?

MR. PAWSON: Yes.

MR. SHANNON: And those figures that you have set forth on that statement, showing the condition of the accounts, the debit balances of the Globe Drug Company on those particular dates, is that right?

MR. PAWSON: Yes.

MR. SHANNON: We offer it in evidence.

MR. JOHNSTONE: To which we object on the ground it is incompetent, irrelevant and immaterial and is not binding on the defendant Klipstein. There has been nothing to bring him within the action at the present time. He is not a stockholder, not a director, and if it is offered for the purpose of showing any apparent insolvent condition of the corporation, this is not the way to do it. They should show, for instance—I call your Honor's attention to the situation as it now stands, and that we believe will be shown here, that there never was any capital stock liability of the corporation; there never was any insolvent condition from a technical or actual standpoint, in all this period of time they have been bringing in evidence before here.

THE COURT: Overruled.

MR. JOHNSTONE: "Exception."

## V

The Court erred in overruling defendant's objection to the introduction into evidence of Plaintiff's Exhibit 5, as follows:

"MR. SHANNON: Now, Mr. Stelzner, do you recognize that book?



MR. STELZNER: (Examining document.) Yes, I do.

MR. SHANNON: Is that the minute book of the Globe Drug Company Inc.?

MR. STELZNER: It is.

MR. SHANNON: We are going to offer this in evidence, your Honor, the whole book for what it is worth to either side in this case, as Plaintiff's Exhibit next number in order.

MR. JOHNSTONE: We object to its introduction on the ground it is incompetent, irrelevant and immaterial and upon the grounds stated before, that the corporation has never been organized and the document itself is not the official record of the corporation that has completed its organization, and upon the ground that as to the defendant Klipstein it is entirely hearsay.

THE COURT: The objection is overruled.

MR. JOHNSTONE: Exception."

## VI

The Court erred in overruling defendant's objection to the introduction into evidence of Plaintiff's Exhibit 6, as follows:

"MR. SHANNON: Mr. Stelzner, isn't this what purports to be a stock certificate book? Look at it and see if you can recognize that.

MR. STELZNER: (Examining document.) Yes.

MR. SHANNON: Is that the stock certificate book of the Globe Drug Company?

MR. JOHNSTONE: To which we object on the grounds already stated, that, if it is a part of the plaintiff's case here, if we are going to, for any purpose at all,

show that, they must show, as a part of their case, that Klipstein was a stockholder, and then the way to do it is to show that he had legal stock issued to him. They cannot, by documents of this kind, made without authority of law, tie him in as a stockholder.

MR. SHANNON: We offer in evidence the stock book as the next in order.

MR. SHANNON: The stock book is admitted?

THE COURT: Yes.

MR. JOHNSTONE: An exception."

## VII

The Court erred in denying defendant's motion to dismiss plaintiff's complaint at the close of plaintiff's evidence as follows:

"MR. JOHNSTONE: May it please the court, on behalf of the defendant Klipstein, we move to dismiss as against that defendant on the grounds heretofore urged at the outset of the case: First, that this action is one that the cause of action is given to the trustee in bankruptcy, unquestionably by the Civil Code of this State, but he has mistaken the forum in which to try the action. The federal court, as such, has no jurisdiction over this type of action in the face of an objection by the defendant. I will not urge that argument further. I think the case is on all fours with the case decided by Justice Holmes.

On the further ground, may it please the court, as to the first cause of action, the defendant Klipstein cannot be held in this action for the reason that it shows if any moneys were paid to any person that they were paid to the bank, and not to the defendant Klipstein. Klipstein cannot be held in this action on the theory that he received property that was taken, admittedly, for the sake of

argument, from the corporation's funds by the defendant Stelzner, and paid out on Stelzner's primary liability to the bank.

We make the further objection, and ask the court to include it as one of the grounds of our motion to dismiss, that there has been absolutely no showing that Klipstein was a director, either de facto or otherwise, in view of the failure on the part of the plaintiff to show that there was ever a valid bona fide issue of stock. The minute book purports to show that Klipstein was elected at a meeting of the stockholders. There could have been no meeting of the stockholders unless there were valid shares issued under the laws as they stood at that time.

We make the further objection and ask to dismiss upon the ground that the cause of action, if it be under Section 363, or Section 366, is barred by the Statute of Limitations by the Civil Code of the State of California, Section 338, subdivisions 1 and 4."

THE COURT: The motions will be denied, gentlemen. Exceptions to the parties."

## VIII

The Court erred in denying defendant's motion, made at the conclusion of the case after all parties had rested, for judgment in favor of defendant by reason of an entire failure of proof. Said motion, among others, was presented in writing by the defendant in lieu of oral presentation, and was denied by the Court with exceptions to the defendants, as follows:

"THE COURT: What do you desire in regard to this matter, gentlemen?"

MR. SHANNON: Well, if your Honor would like oral argument I will stay and argue, but I would be just as willing to go home and submit on briefs.

MR. JOHNSTONE: I think in view of the several questions involved that we would prefer to submit it on briefs.

THE COURT: The case will stand submitted on briefs."

(DEFENDANT'S BRIEF): "There was a complete failure of proof necessary to entitle complainant to a recovery against defendant Klipstein."

\*\*\*\*\*

"Defendant Klipstein therefore asks this Court to declare by its judgment that neither in equity or law has the complainant the right to recover any part of the moneys by him claimed."

Whereupon, and after consideration thereof, the Court made the following order:

". . . the cause having been submitted to the Court for decision, and the Court having considered the evidence and the law and the arguments and briefs of counsel, now finds in favor of the plaintiff and (upon the authority of *In re Wright Motor Company* (C. C. A. 9, 1924) 299 Fed 106) orders a decree entered ordering and decreeing that plaintiff do have and recover from the defendants Lew O. Stelzner and T. E. Klipstein and each of them, the sum of \$4,255.54 and accrued interest, the same being the sums shown to have been illegally withdrawn and paid out by the defendants and for which they are liable to account to the plaintiff."

Exception to the defendants."

## IX

The Court erred in denying defendant's motion, made at the conclusion of the case after all parties had rested, for judgment in favor of defendant by reason of complainant's failure to prove that defendant Klipstein received any benefit whatever from any transaction in question. Said motion, among others, was denied by the Court with exceptions to the defendants.

## X

The Court erred in denying defendant's motion, made at the conclusion of the case after all parties had rested, for judgment in favor of defendant by reason of complainant's failure to prove that said defendant Klipstein ever became or ever was a director of the Globe Drug Company. Said motion, among others, was denied by the Court with exceptions to the defendants.

## XI

The Court erred in denying defendant's motion, made at the conclusion of the case after all parties had rested, for judgment in favor of the defendant upon the ground that complainant was estopped from asserting his alleged cause of action. Said motion, among others, was denied by the Court with exceptions to the defendants.

## XII

The Court erred in making and entering its Finding of Fact Number II as follows:

"That at all times herein mentioned said Globe Drug Company, Inc. was a corporation duly organized and existing under and by virtue of the laws of the State of California; that ever since January 3, 1928, the defendant Lew O. Stelzner was a stockholder, the president and

one of the members of the Board of Directors of said corporation and the defendant T. E. Klipstein was a stockholder, the secretary, and one of the members of the Board of Directors of said corporation.”;

to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

### XIII

The Court erred in making and entering its Finding of Fact Number III, as follows:

“That on January 3, 1928, the defendants Lew O. Stelzner and T. E. Klipstein borrowed the sum of \$17,000.00 from the Bank of America, and in consideration of such loan executed to such bank their personal joint and several promissory note for the same; that said sum of \$17,000.00 was thereupon used by said defendants for the purpose of purchasing certain issued and outstanding shares of said Globe Drug Company, Inc., for their own personal and individual accounts.”;

to which said finding an exception in favor of defendants was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

### XIV

The Court erred in making and entering its Finding of Fact Number IV, as follows:

“That during the period of time from the execution of said note up to October 19, 1935, various payments were

made on account of the principal and interest of said note, aggregating a sum in excess of \$12,200.00; that all of such payments were made by, and directly from and with the funds of, said corporation; that at each and all of the times when said payments were made as aforesaid, said corporation owed various sums of money to various creditors, such indebtedness at such times being in excess of the amounts of such respective payments; that no consideration whatsoever was ever received by said corporation for or in connection with any of said payments; that for a period of at least three years prior to the date of its adjudication in bankruptcy, said corporation was in an insolvent condition; that the payments made by said corporation on the personal note of said defendants during said three-year period aggregated a sum of at least \$4,255.54; that each and all of said payments were made as aforesaid with the purpose and intent on the part of said corporation, and of said defendants, of hindering, delaying, and defrauding the creditors of said corporation.”;

to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XV

The Court erred in making and entering its Finding of Fact Number V, as follows:

“That on or about October 19, 1935, there remained unpaid on the principal of said promissory note a balance of \$4,800.00; that on or about said date defendants, acting as directors and officers of said corporation, caused

to be executed to said Bank of America the promissory note of said corporation in the sum of \$4,800.00; that said note was thereupon accepted by said bank in payment of the balance due on said promissory note of the defendants; that said corporation received no consideration for the execution of said note; either directly or indirectly.”; to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XVI

The Court erred in making and entering its Finding of Fact Number VI, as follows:

“That shortly after the execution of said last mentioned promissory note, the defendant Klipstein purchased the same from said bank and thereupon, and on October 19, 1935, commenced an action in the Superior Court of the State of California, in and for the County of Kern, to recover from said corporation the amount alleged by him to have been so paid in the purchase of said note;

illegally and without right or cause [LRY] that thereafter the defendants, ~~fraudulently~~ permitted said corporation to suffer a default judgment to be entered in said action against it for the sum of \$5,364.00; that thereafter execution was issued on said judgment, pursuant to which all of the properties and assets of said corporation were sold at public auction by the sheriff of said county.”;



to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XVII

The Court erred in making and entering its Finding of Fact Number VII, as follows:

“That at the time said action was commenced and said execution sale was effected as aforesaid, said corporation owed various sums of money to various creditors and was insolvent, and said action was commenced and prosecuted, such judgment was suffered to be taken, and said execution sale effected with the purpose and intent on the part of said corporation and the defendants of hindering, delaying, and defrauding the creditors of said corporation.”;

to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XVIII

The Court erred in making and entering its Finding of Fact Number VIII, as follows:

“That the payments made out of said corporation’s funds as aforesaid, were authorized and consented to by the defendants while they were acting as officers and

directors of said corporation, and while they were stockholders thereof; that said payments were not made out of surplus or net profits of said corporation, nor was said corporation then in the process of winding up or dissolution; that said payments were made without the vote or written consent of any of the shares of said corporation other than the shares held by the defendants; that no permit of the Commissioner of Corporations of the State of California was ever applied for or issued authorizing such payments.”;

to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XIX

The Court erred in making and entering its Finding of Fact Number IX, as follows:

“That this action is not barred by any statute of limitations of the State of California, or otherwise; nor is plaintiff chargeable with any laches in the commencement and maintenance of this action; nor is plaintiff estopped from commencing and maintaining this action.”;

to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that there is no competent evidence in the record to support such finding.

## XX

The Court erred in making and entering its Finding of Fact Number X, as follows:

“That this Court has jurisdiction over this action.”; to which said finding an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that said finding is erroneous in law.

## XXI

The Court erred in making and entering its Conclusion of Law Number I, as follows:

“That all the payments made out of said corporation’s funds as above described, were wrongfully and illegally made, and were and are fraudulent  $\wedge$  and void as to plaintiff.”

to which said conclusion of law an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that such conclusion of law is not supported by the evidence or by the facts found.

## XXII

The Court erred in making and entering its Conclusion of Law Number II, as follows:

“That defendants shall pay to plaintiff, as trustee in bankruptcy of said corporation, such sum of money which, together with the present assets of the estate of said bankrupt, will suffice to satisfy all just and proper claims

and reasonable allowances and expenses in such bankruptcy proceedings, which amount is tentatively estimated at the sum of \$4,500.00.”

to which said conclusion of law an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that such conclusion of law is not supported by the evidence or by the facts found;

And for the further reason that said conclusion of law is void for uncertainty in that it cannot be determined therefrom what are the “just and proper claims and reasonable allowances and expenses” by which the liability of defendant to plaintiff is to be determined.

### XXIII

The Court erred in making and entering its Conclusion of Law Number III, as follows:

“That as soon as may be after the payment by defendants of said sum of \$4,500.00 and plaintiff’s costs herein, a report shall be filed in this proceeding by the Referee in Bankruptcy, showing the exact amount necessary to satisfy all just and proper claims and reasonable allowances and expenses in the said bankruptcy proceedings, and plaintiff shall thereupon have and recover of and from the defendants, and each of them, the amount, if any, shown by such report to be yet necessary to satisfy all just and proper claims and reasonable allowances and expenses in said bankruptcy proceedings, and plaintiff shall be entitled to have execution therefor; that if such re-

port shows that there is a balance remaining out of said sum of \$4,500.00, after paying all just and proper claims and reasonable allowances and expenses in said bankruptcy proceedings, the excess thereof, if any, is to be paid to said defendants.

to which said conclusion of law an exception in favor of defendant was duly allowed and noted at the foot of the Findings of Fact and Conclusions of Law.

For the reason that such conclusion of law is not supported by the evidence or by the facts found;

For the further reason that said conclusion of law is void for uncertainty in that it cannot be determined therefrom what are the "just and proper claims and reasonable allowances and expenses" by which the liability of defendant to plaintiff is to be determined.

And for the further reason that said conclusion of law is void in that the liability of defendant to plaintiff is made by said conclusion to depend upon a report to be filed by the Referee in Bankruptcy in the matter of the estate of the Globe Drug Company, Inc., bankrupt, in which proceeding in bankruptcy defendant is not represented and has no standing and defendant is therefore by said conclusion deprived of his day in court to litigate the reasonableness and propriety of any allowances and expenses included in said report to be filed by said Referee.

#### XXIV

The Court erred in making and entering its decree, as amended, for the reason that there is no substantial evidence to sustain said decree.

## XXV

The Court erred in making and entering its decree, as amended, for the reason that the facts found do not sustain said decree.

## XXVI

The Court erred in making and entering its decree, as amended, for the reason that said decree is void for uncertainty in that the amount of defendant's liability to plaintiff cannot be determined therefrom.

## XXVII

The Court erred in making and entering its decree, as amended, for the reason that said decree is void in that the liability of defendant to plaintiff is made by said decree to depend upon a report to be filed by one C. E. Arnold, Referee in Bankruptcy in the matter of the estate of the Globe Drug Company, Inc., bankrupt, in which proceeding in bankruptcy defendant is not represented and has no standing and defendant is therefore by said decree deprived of his day in court to litigate the reasonableness and propriety of any allowances and expenses included in said report to be filed by said Referee.

## XXVIII

The Court erred in denying defendant's petition for a rehearing upon the ground of newly discovered evidence, said evidence being that no claim of defendant against Globe Drug Company, based either upon the judgment in the sum of \$5,364.00, or otherwise, had ever been filed with plaintiff, as trustee in bankruptcy of the Globe Drug

Company, and that the time for such filing had expired, an exception to which ruling was taken by defendant and duly allowed by the Court.

### PRAYER FOR REVERSAL

Comes now T. E. Klipstein, defendant and appellant herein, and prays for a reversal of the decree of the United States District Court for the Southern District of California, made and entered the 29th day of December, 1937, as amended by an order of said Court made and entered on the 2nd day of April, 1938.

Dated this 25th day of April, 1938.

HOMER JOHNSTONE

SIDNEY H. WYSE

By Homer Johnstone

Attorneys for appellant.

[Endorsed]: Filed Apr. 25, 1938. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

UNDERTAKING ON APPEAL FROM A MONEY  
JUDGMENT, AND FOR COSTS

KNOW ALL MEN BY THESE PRESENTS: That we, T. E. Klipstein as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and duly licensed to transact a general surety business in the State of California, as surety, are held and firmly bound unto the above-named HERBERT P. SEARS, Trustee of The Estate of Globe Drug Company, Inc., Bankrupt, in the sum of Six Thousand Dollars (\$6,000.00); to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors and assigns, respectively, firmly by these presents.

Sealed with our seals and dated this 26th day of April, 1938.

WHEREAS, the above-named defendant, T. E. Klipstein, has prosecuted his appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree entered in said cause, by the United States District Court for the Southern District of California, Northern Division, on the 29th day of December, 1937, as modified and amended by an order of said Court made and entered on the 2nd day of April, 1938, against said defendant T. E. Klipstein for the sum of Four Thousand Five Hundred Dollars (\$4,500.00), including interest and costs.



NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant T. E. Klipstein, shall prosecute his appeal to effect and answer all costs and damages if he fails to make good his plea, then this obligation to be void, otherwise in full force and virtue.

IN WITNESS WHEREOF, said principal has affixed his signature hereto, and the said HARTFORD ACCIDENT AND INDEMNITY COMPANY, has caused these presents to be executed and its official seal attached hereto by its duly authorized ATTORNEY IN FACT, at Los Angeles, California this 26th day of April A. D., 1938.

T. E. Klipstein

Principal

[Seal]

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY,

By E. H. Clare

Its Attorney-in-Fact

APPROVED:

Leon R. Yankwich  
Judge.

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF LOS ANGELES )

On this 26th day of April, 1938, before me, a Notary Public in and for the State of California and the County of Los Angeles, personally appeared T. E. KLIPSTEIN, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

[Seal] Helen M. Kilgore  
Notary Public in and for the County of Los Angeles, State of California

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF LOS ANGELES )

On this 26th day of April, in the year 1938, before me, a Notary Public in and for the State and County afore-said, personally appeared E. H. CLARE, known to me to be the attorney-in-fact of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

[Seal] Helen M. Kilgore  
Notary Public in and for the County of Los Angeles, State of California

Examined & recommended for approval as provided in Rule 28.

Homer Johnstone & S. H. Wyse  
Attorneys for Appellant

[Endorsed]: Filed Apr. 26, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

STIPULATION

IT IS HEREBY STIPULATED by and between Herbert P. Sears, plaintiff and appellee, and T. E. Klipstein, defendant and appellant, in the above-entitled cause, by and through their respective attorneys, that there may be omitted from the transcript of the record of said cause on appeal to the Circuit Court of Appeals for the Ninth Circuit all affidavits of personal service or service by mail and all acknowledgments of service of the various pleadings and documents to be incorporated in said transcript.

Dated this 24 day of May, 1938.

A. L. Shannon

C. A. Shuey

Attorneys for plaintiff and appellee

Herbert P. Sears.

Homer Johnstone

Sidney H. Wyse

Attorneys for defendant and appellant

T. E. Klipstein.

[Endorsed]: Filed Aug. 2, 1938. R. S. Zimmerman,  
Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF THE DISTRICT COURT OF  
THE UNITED STATES FOR THE SOUTH-  
ERN DISTRICT OF CALIFORNIA:

You will please incorporate in the transcript of the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, the following, omitting therefrom all affidavits of personal service or service by mail, acknowledgments of service, and endorsements, except the dates of filing.

1. Answer of Defendant Lew O. Stelzner.
2. If Motion to Dismiss Bill of Complaint is inserted, order denying such motion should also be inserted.

Dated: July 25, 1938.

A. L. Shannon

C. A. Shuey

Attorneys for Plaintiff

[Endorsed]: Filed Jul. 26, 1938. R. S. Zimmerman,  
Clerk By R. B. Clifton, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF THE DISTRICT COURT OF  
THE UNITED STATES FOR THE SOUTH-  
ERN DISTRICT OF CALIFORNIA:

You will please incorporate in the transcript of the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, the following, omitting therefrom all affidavits of personal service or service by mail, acknowledgments of service, and endorsements, except the dates of filing.

1. Amended Bill of Complaint
2. Stipulation for Filing of Amended Bill of Complaint
3. Answer of Defendant T. E. Klipstein
4. Amendment to the Answer of the Defendant T. E. Klipstein
5. Stipulation to Set for Trial
6. Trial Brief of Defendant Klipstein, submitted in lieu of oral argument, omitting therefrom everything except the date of filing and the following designated portions thereof, to-wit:

“There was a complete failure of proof necessary to entitle complainant to a recovery against defendant Klipstein.”

\*\*\*\*\*

“There was no proof that defendant Klipstein received anything by reason of any transaction in question, and in fact the proof showed affirmatively that he was the loser by such transactions of more than \$5,000.00.”

\*\*\*\*\*

“There was no proof that defendant Klipstein was a de jure director of the bankrupt, and there was insufficient proof to hold him as a de facto director.”

\*\*\*\*\*

“Complainant is estopped from asserting that defendant Klipstein is liable on the causes of action stated.”

\*\*\*\*\*

“Defendant Klipstein therefore asks this Court to declare by its judgment that neither in equity or law has the complainant the right to recover any part of the moneys by him claimed.”

7. Minute Order of December 4th, 1937
8. Findings of Fact and Conclusions of Law (including interlineations in long-hand)
9. Decree (including interlineations in long-hand)
10. Order to Show Cause
11. Minute Order of April 2nd, 1938.
12. Petition for Appeal and Order Allowing Appeal
13. Assignment of Errors
14. Undertaking on Appeal
15. Stipulation for Order of Severance
16. Order of Severance

17. Statement of Evidence and Order Settling Statement of Evidence
18. Citation on Appeal
19. Stipulation of May 24, 1938, regarding certain omissions from transcript on appeal
20. This Praeceptum, with admission of service

You will please print a total of forty (40) copies of said transcript on appeal.

Homer Johnstone

Sidney H. Wyse

Attorneys for defendant and appellant

T. E. Kilstein

[Endorsed]: Receipt of copy is hereby acknowledged this 25th day of July, 1938. A. L. Shannon C. A. Shuey Attorneys for plaintiff and appellee, Herbert P. Sears. Filed Aug. 2 - 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 97 pages, numbered from 1 to 97, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; stipulation for filing of amended bill of complaint; amended bill of complaint; answer of T. E. Klipstein; answer of Lew O. Stelzner; stipulation to set for trial; amendment to answer of T. E. Klipstein; trial brief of Klipstein, summary of points discussed; order of December 4, 1937 finding for plaintiff; findings of fact and conclusions of law; decree; order to show cause; order of April 2, 1938 modifying decree, etc.; statement of evidence; stipulation for order of severance; petition for appeal and order allowing appeal; assignment of errors; undertaking on appeal from a money judgment and for costs; stipulation; praecipe for appellee; praecipe for appellant.

DO FURTHER CERTIFY that the amount paid for printing the foregoing Record on Appeal is \$            and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certi-



fyng the foregoing Record on Appeal amount to \$  
and that said amount has been paid me by the appellant  
herein.

IN TESTIMONY WHEREOF, I have hereunto set my  
hand and affixed the Seal of the District Court of the  
United States of America, in and for the Southern  
District of California, Central Division, this.....  
day of September, in the year of Our Lord One  
Thousand Nine Hundred and Thirty-eight and of our  
Independence the One Hundred and Sixty-third.

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.

